

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD ROBINSON,

Defendant and Appellant.

C058491

(Super. Ct. No. NCR65046)

Defendant was sentenced to 26 years to life in prison following his conviction for burglary and petty theft with a prior, and the finding of two strike priors and one prior prison term. He appealed, contending the trial court erred in failing to appoint counsel to represent him when the court declared a doubt as to defendant's competency. In *People v. Robinson* (2007) 151 Cal.App.4th 606 (*Robinson I*), this court agreed defendant was entitled to counsel at the competency hearing. We reversed and remanded for a retrospective competency hearing, at

which counsel was to be appointed for defendant. If defendant was found to have been competent to stand trial, the judgment would be reinstated. (*Robinson I*, at p. 619.)

On remand the trial court held a retrospective competency hearing, at which defendant was represented by counsel. The court found defendant had been competent at trial and reinstated the judgment. Defendant appeals, contending the denial of his right of self-representation at the retrospective competency hearing was reversible per se and that the trial court erred in excluding defendant's lay opinion that he became mentally ill before trial. In a supplemental brief, defendant contends the trial court erred in placing the burden of proof as to his incompetency on defendant. We affirm. The trial court properly appointed counsel to correct the earlier error, regardless of whether defendant was subsequently competent to waive counsel. Any error in excluding defendant's lay opinion was harmless. The trial court did not err in placing the burden of proof of incompetence on defendant.

### **FACTS**

In January 2005, defendant broke into a convenience store at night and stole alcohol and cigarettes.

In April, a doubt was declared as to his competency and he was referred to Dr. Busey for an evaluation pursuant to Penal Code section 1368. The following month, defendant was found competent to stand trial.

In May 2005, the court granted defendant's motion to represent himself. The next month, the court had concerns about defendant's competency and appointed Dr. Carlson to evaluate him. Defendant submitted the matter on Dr. Carlson's report, and the court found defendant competent to stand trial.

Defendant was convicted of burglary and petty theft with a prior. The court sentenced defendant to 26 years to life in prison, based on a finding of two strike priors and one prior prison term.

Defendant appealed, contending the trial court erred in failing to appoint counsel to represent defendant at the second competency hearing. (*Robinson I, supra*, 151 Cal.App.4th at p. 609.) This court agreed, but found the error could be corrected. The judgment was reversed and the matter remanded for a retrospective competency hearing at which counsel was to be appointed for defendant. In the event defendant was found to have been competent to stand trial, the judgment was to be reinstated. (*Id.* at p. 619.)

In 2007, on remand, counsel was appointed to represent defendant. After several continuances, and waiver of jury trial, a court trial was held in January 2008. The issue at trial was defendant's competency to stand trial at the time of the last competency hearing in July 2005.

Several officers who worked in the jail and had contact with defendant testified about his behavior. Defendant often

talked to himself, but the officers saw no signs of hallucinating and they could carry on normal conversations with defendant. Defendant liked attention and often hid or destroyed things or made threats to get attention. Three officers testified they had no cause to refer defendant for a mental health evaluation. One referred him three times because he was acting out, painting his face and ripping stuff apart. Defendant was prescribed psychotropic medicine, but often refused it. During defendant's last three months in jail, he was placed on bizarre behavior watch for destructive behavior.

The mother of defendant's daughter lived with defendant the five months before he was arrested. She had concerns about his mental health because he would act up by making faces and such. Defendant talked to himself, sometimes hallucinating. While in jail, defendant made crazy faces and said "some things," but he was able to communicate and knew his children and grandchildren. At times, he made faces and hissed like a cat.

Defendant's daughter testified he acted kind of crazy, making faces and talking to himself or someone not there. In jail, defendant made faces at her children, but was able to carry on a conversation.

Defendant's family reported he drank to excess and used methamphetamine.

When defendant took the stand his attorney asked if he lived in the Tehama area for the five months before his arrest.

Defendant answered, "I lived in the Tehama area from September 9th of 2005, where I left the Live Again Recovery Homes, Incorporated, licensed by the [S]tate of California for alcohol and drug rehabilitation where I had been living for three and a half years. It was a nine-month program. I became mentally ill and the director allowed me to stay because I couldn't function."

The prosecutor objected to "I became mentally ill," on the basis of hearsay and foundation; defendant had no qualifications to diagnose himself. The court sustained the objection and granted the motion to strike. The court admonished defendant to answer only the question asked and not go beyond the question.

Defendant testified he lived at a drug and alcohol treatment program from January 2001 until September 2004. He was under treatment for mental health issues. He was prescribed numerous psychotropic medications, which he left behind when he went to Tehama.

Defendant claimed he could not leave the house at Tehama for two months. He was afraid of being outside, talking to people, and dying. He felt isolated and depressed; he heard voices and saw hallucinations. He received psychotropic medications in jail, which helped, but they were withdrawn three times. He had no medications the two weeks before the trial.

Defendant testified he prepared a case of not guilty by reason of insanity. He claimed he was incompetent to stand

trial; he was confused and did not understand the ramifications and differences between a plea of not guilty by insanity and competency.

Dr. Carlson testified to his evaluation of defendant in June 2005. He performed a mental status examination and found defendant had decent reality contact and no symptoms of hallucinating or delusional thinking. Defendant had decent memory and was intelligent. He had a significant drug and alcohol history. Testing revealed no competency issues. Defendant mentioned a past diagnosis of bipolar disorder, but Carlson saw no sign defendant was in an active phase. Defendant understood the charges and had a better than average understanding of procedure; he was competent.

Carlson noted defendant had narcissistic personality features and was anti-social, having a conflict with authority. Defendant was prescribed medication in jail, but it was stopped when they discovered defendant was "cheeking" it.

The trial court found, at best, two witnesses who suggested defendant may have problems, but the evidence was overwhelming that defendant was competent at the time of trial. The proof went beyond the preponderance of the evidence standard. Defendant understood the nature and purpose of the proceedings and was able to assist his attorney. There was nothing whatsoever to contradict the presumption of competence.

The judgment was reinstated.

## DISCUSSION

### I.

#### **The Trial Court Properly Appointed Counsel to Represent Defendant at the Retrospective Competency Hearing**

In *Robinson I*, this court noted that when a criminal defendant of questionable mental competence wants to represent himself, the trial court faces a conflict between two constitutional commands: the defendant's right of self-representation under *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] and prohibition on trying mentally incompetent defendants (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354 [134 L.Ed.2d 498, 506])). (*Robinson I, supra*, 151 Cal.App.4th at pp. 611-612.)

We concluded that defendant had a right to assistance of counsel at the competency hearing, distinguishing federal cases which found no error where defendant remained unrepresented at a competency hearing. (*Robinson I, supra*, 151 Cal.App.4th at pp. 612-616.) Recognizing the trial court faced two potentially reversible errors by either denying counsel at the competency hearing or denying the right of self-representation, we held that "whenever a trial court makes a formal order suspending proceedings and appointing a doctor pursuant to Penal Code section 1368, the court must appoint counsel to represent the defendant. If the court has a reasonable doubt as to defendant's competency to stand trial, that doubt should extend

to the defendant's competency to waive counsel and represent himself." (*Id.* at p. 616.)

We then turned to the question of remedy. Mindful that defendant did not challenge the result of the competency hearing or his subsequent competence at trial where he had counsel, this court found the error could be cured by providing defendant with what he had been denied--a competency hearing with the assistance of counsel. The assistance of counsel was necessary because, in July 2005, there was a doubt as to defendant's competence. We found the case was appropriate for a retrospective competency hearing. Factors favoring this remedy were (1) the competency hearing had been less than two years ago; (2) the record contained both medical evidence about defendant's mental state and his comments from which his mental state could be inferred; and (3) there was no speculation about future proceedings because defendant was represented at trial by counsel. (*Robinson I, supra*, 151 Cal.App.4th at pp. 617-618.)

After receiving what he had earlier been denied--assistance of counsel at a competency hearing in July 2005--defendant now contends he was denied his right of self-representation. He contends he had the right to waive counsel at the retrospective competency hearing and the trial court erred by refusing to allow him to do so.

Defendant misconstrues the nature of the retrospective competency hearing. It was not a new proceeding based on



defendant's mental state in 2008. Rather, it was an attempt to go back in time to 2005 and provide assistance of counsel at the competency hearing. As such, defendant's professed mental competence to waive counsel in 2008 is irrelevant. The issue was his mental competence in 2005. The trial court had declared a doubt as to his competence at that time. In *Robinson I*, we held that doubt must extend to defendant's competency to waive counsel. (*Robinson I, supra*, 151 Cal.App.4th at p. 616.) This position has been recently affirmed by the United States Supreme Court. In *Indiana v. Edwards* (2008) \_\_ U.S. \_\_, \_\_ [171 L.Ed.2d 345, 357], the court held "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States* (1960) 362 U.S. 402, 4 L.Ed.2d 824] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

Defendant contends that if *Robinson I* sets forth a per se rule that all defendants must be represented by counsel at competency hearings, such a rule is unconstitutional because it denies the right of self-representation in all instances. We need not address this contention. Assuming without deciding that defendant should have been able to waive counsel, the error is necessarily harmless because he had a competency hearing at which he represented himself. Given that the results of both hearings were the same, defendant has suffered no possible

prejudice by having a second hearing with the assistance of counsel.

## II.

### **It Was Not Prejudicial Error to Exclude Defendant's Testimony That He Became Mentally Ill**

Defendant contends the trial court erred in excluding his lay opinion that he became mentally ill. He contends lay opinion on mental states short of insanity is permissible. He contends the error was reversible because the evidence at the retrospective competency hearing was "sharply conflicting." We reject this contention.

Defendant testified he became mentally ill as part of the answer to a question whether he lived in the Tehama area before his arrest. The trial court properly sustained an objection and struck defendant's testimony because his answer was nonresponsive and in narrative form. A witness, including a defendant, is restricted to responding to questions and is not allowed to proceed in narrative form. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 353.) Further, defendant's answer about his time at Live Again Recovery Homes and why he stayed past nine months was nonresponsive to counsel's question. (See *People v. Beaugez* (1965) 232 Cal.App.2d 650, 661-662 [testimony of expert not improperly curtailed by sustaining objection to nonresponsive answer to vague question].) While the prosecutor objected only on the basis of hearsay and foundation, the trial court clearly considered the nonresponsive, narrative form of

the answer as it admonished defendant not to go beyond the question asked.

Moreover, defendant was not prejudiced by the exclusion of this evidence because it would not have resulted in a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 837; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1213.) First, the substance of the stricken testimony came in through defendant's subsequent testimony. He testified he was treated for mental health issues and prescribed psychotropic medications. He left the medications behind when he came to Tehama, where he suffered from paralyzing fear, heard voices and had hallucinations. He was again prescribed psychotropic medications in jail, but they were withdrawn and he had none before trial.

Second, the court as trier of fact found the evidence "overwhelming" that defendant was competent to stand trial. All of the witnesses testified defendant was able to communicate and carry on a conversation; he understood what was happening. Dr. Carlson found no sign of incompetency. The jail staff found defendant annoying, disruptive and destructive; he acted out to gain attention. This view of defendant as manipulative rather than incompetent was confirmed by defendant himself. When the hearing officer at the hearing on defendant's jail violations asked defendant why he did such things, defendant responded he was trying to manipulate court proceedings and when that failed

he wanted to make staff angry and miserable because he was miserable in jail.

### III.

#### **The Trial Court Did Not Err in Placing the Burden of Proof of Incompetence on Defendant**

In a supplemental brief, defendant contends it was fundamentally unfair and violated due process to apply a presumption of competence at the retrospective competency hearing. Penal Code section 1369, subdivision (f) creates a presumption of competence.<sup>1</sup> Defendant, relying on *People v. Ary* (2009) 173 Cal.App.4th 80 (*Ary II*),<sup>2</sup> contends that presumption does not apply at a retrospective competency hearing.

We need not determine whether we agree with the majority in *Ary II* because its reasoning does not apply in this case. The *Ary II* court made clear its holding applied only to a retrospective competency hearing held "after a *Pate* violation." (*Ary II, supra*, 173 Cal.App.4th at p. 89.) The decision in *Ary II* was premised upon there being a *Pate* violation because in those cases "the question of competence is close, and the burden of proof will therefore be determinative." (*Id.* at p. 102.)

---

<sup>1</sup> Penal Code section 1369, subdivision (f) provides in part: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent."

<sup>2</sup> The California Supreme Court granted review of *Ary II, supra*, 173 Cal.App.4th 80 on July 29, 2009 (S173309).

The factual scenario here is different from the *Ary II* facts. Here, defendant had a timely competency hearing; the issue was whether he had the right to counsel at that hearing even though he was representing himself. The distinction is important because the question of defendant's competence was not close. At the first competency hearing, defendant agreed with Dr. Carlson's report that found him competent. (*Robinson I, supra*, 151 Cal.App.4th at p. 611.) At the second, retrospective competency hearing with counsel, the court found the evidence that defendant was competent was "overwhelming." Because the evidence was not even close to equipoise, the due process concerns raised in *Ary II* are not present. The trial court did not err in placing the burden of proof on defendant.

#### **DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
CANTIL-SAKAUYE, J.

We concur:

\_\_\_\_\_  
SCOTLAND, P. J.

\_\_\_\_\_  
ROBIE, J.